No. 658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

PACKARD MOTOR CAR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION OF CHRYSLER CORPORATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

and

BRIEF AS AMICUS CURIAE

NICHOLAS KELLEY
B. R. ISERMAN
Attorneys for CHRYSLER CORPORATION,
Amicus Curiae
79 Broadway, New York City

KATHERINE, PERRY, KELLEY & DYKE,
Of Counsel

No. 658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

PACKARD MOTOR CAR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION

NOW COMES Chrysler Corporation, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and respectfully moves this Honorable Court for leave, through its attorneys, to file the accompanying brief in this case as *amicus curiae*.

We annex hereto copies of a letter received from the attorneys for the petitioner and of a telegram from the General Counsel of the respondent in this case consenting to the filing of said brief.

Dated: New York, January 4, 1947.

Respectfully submitted,

NICHOLAS KELLEY,
T. R. ISERMAN,
Attorneys for CHRYSLER CORPORATION,
Amicus Curiae,
70 Broadway,
New York 4, N. Y.

RATHBONE, PERRY, KELLEY & DRYE,
of Counsel.

WESTERN UNION TELEGRAM

1947 JAN 2 PM 3 04

WU135 14/13 GOVT—WUX WASHINGTON DC 2 256P
T R ISERMAN—
70 BROADWAY NYK—

REURTEL PACKARD BOARD CONSENTS TO FILING
OF BRIEF AMICUS

GERHARD P VAN ARKEL—
GEN COUNS NLRB.

BODMAN, LONGLEY, BOGLE, MIDDLETON & ARMSTRONG
1400 Buhl Building
Detroit 26, Michigan

January 3, 1947

Mr. T. R. Iserman,
Messrs. Rathbone, Perry, Kelley & Drye,
Central Hanover Bank and Trust Company Building,
70 Broadway,
New York 4, New York.

In re: Packard Motor Car Company, Petitioner v. *National Labor Relations Board, Respondent—Supreme Court of the United States, October Term, 1946—No. 658*

Dear Mr. Iserman:

This is to advise you that as attorney for the petitioner, Packard Motor Car Company, in the above entitled case, I not only have no objection to your filing of a brief amici with the Supreme Court, but would appreciate your doing so.

Yours truly,

LOUIS F. DAHLING

Louis F. Dahling

LFD:LD

CONTENTS

AUTHORITIES

Table of Cases

STATUTES

MISCELLANEOUS

No. 658

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1946

PACKARD MOTOR CAR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF ON BEHALF OF CHRYSLER CORPORATION, *AMICUS CURIAE*

Summary of Argument

We purpose in this Brief to show that the order of the National Labor Relations Board directing Packard to bargain collectively with the Foremen's Association of America as the representative of three ranks of foremen and a group of special assignment men is incorrect, in the light of (1) the purpose of the National Labor Relations Act to regulate commerce (the only constitutional purpose Congress could have had in passing that Act), and (2) of the general law as Congress has fortified the general law by providing in the Administrative Procedure Act [Secs. 10(a) and 10(e)] for correcting "legal wrong".

The facts in the record, particularly those relating (1) to the duties of foremen and (2) to the effect of foremen's unionizing, even in a union that professes to be "independent" of the union of the men they supervise, show that certifying an exclusive bargaining representative for foremen is against the constitutional purpose of the Act, and is contrary to the rule of the law of agency against divided loyalty. This rule of law the Act, by its own terms, seems to preserve. In any event this Court ought to protect it. And the Administrative Procedure Act, by its clear terms and intent, requires that the rule of law shall prevail over presumed "expertness" of the National Labor Relations Board.

FIRST POINT

Neither experience nor evidence in this case shows that unionizing foremen is appropriate to further the constitutional purpose of the National Labor Relations Act, namely, to increase output and to promote the flow of commerce. Experience, the evidence and common sense all are to the contrary.

1. The Order of the Board Is Valid only if it Furthers the Constitutional Purpose to Increase the Flow of Commerce.

Congress has no authority to deal with unionizing and collective bargaining as ends in themselves, but only as a means of exercising its constitutional power to regulate commerce. *Kidd* v. *Pearson*, 128 U. S. 1, 20, 21, (1888); *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 407, 408 (1922); *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178 (1923); *United Leather Workers* v. *Herbert & Meisel Trunk Co.*, 265 U. S. 457, 465 (1924); *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310 (1925); *A. L. A. Schechter Poultry Corp. et al* v. *United States*, 295 U. S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936).

As Congress stated explicitly in Section 1 of the Act itself, it was to increase output of goods that move in the stream of commerce, and thus to increase its flow, that Congress passed the National Labor Relations Act, and it was upon this purpose, and upon no other, that this Court upheld the constitutionality of the Act. *Labor Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 38-40 (1937); *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 604 (1939); *Consolidated Edison Company of New York* v. *National Labor Relations Board*, 305 U. S. 197, 222, 237 (1938).

There were doubts at the time that unionizing and collective bargaining were an appropriate means to increase output and increase the flow of commerce. See: Sumner H. Slichter, *Union Policies and Industrial Management*, The Brookings Institution, Washington, D. C., pp. 9-10, 50,

95, 164-197 (1941); U. S. Department of Justice, *Anti-Trust Cases in the Construction Industry*, Senate Committee Print No. 12, 79th Congress, 2nd Session; Williamson and Harris, *Trends in Collective Bargaining*; Twentieth Century Fund, Inc., New York, pp. 104-112 (1945); T. R. Iserman, *Industrial Peace and the Wagner Act*, McGraw-Hill Book Company, Inc., New York, pp. 8-9 (1947). Not leaving these doubts to be resolved by evidence, Congress, by legislative fiat, in the preamble of the National Labor Relations Act, established what it wished the Court to regard as the "facts", saying (Section 1):

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargainging power between employers and employees."

Since the National Labor Relations Act was the first Act of its kind in any country, one may ask whose "experience" Congress was referring to in saying that compelling employers against their will to deal with unions and compelling workers on the vote of a bare majority to permit unions to handle their dealings with their employers would promote the flow of commerce. If Congress was basing its statement upon experience with voluntary collective bargaining, it had only to turn to the literature to find that many unions not only put artificial restrictions upon output but also engage in practices that impede it. It had only to turn to Government records to find that industrial strife and strikes had been more than ten times as great among employees who bargained collectively as among those who did not. Bureau of Labor Statistics, U. S. Department of Labor, Bulletin No. 651, *Strikes in the United States*, 1880-1936.

However valid were the assertions of Congress as applied to the "workers," and "wage earners" who were the "employees" to which it referred in the preamble of the Act, certainly there was not then, and there is not now, any "experience" that supports the thesis that compulsory unionizing of foremen and compulsory collective bargaining over the terms on which they take their positions, work and advance in the great productive industries of America, are in the interest of increasing output or promotes the flow of commerce. Experience and common sense show the contrary, and they, as well as the terms of the Act, clearly call for vacating the order of the Board.

2. Declarations by Congress of What It Purported to Have Found from Experience, and upon the Basis of Which This Court Upheld the Constitutionality of the Act, Could Not Relate to Foremen, and Congress Did Not Intend Them to Relate to Foremen.

Certainly, Congress was not speaking of foremen in the mass producing industries of America when it spoke of what it thought "experience" had proved. When Congress passed the Act foremen were not organized in any such industry. On the contrary, then and in later years, most unions in these industries excluded foremen from membership and regarded the foremen as their worst enemies. The only industries in which some supervisors were organized were a few backward ones—shipping, which existed only by virtue of subsidies and other Government help; railroads, which in large part had been in bankruptcy or facing it for many years; construction, where collusive agreements between employers and unions cost the public so dearly and cause so much concern to the Anti-Trust Division of the Department of Justice, and job shops in the printing trades, where collective bargaining takes the form of unions laying down "laws" for employers to follow. Obviously, experience in these industries could not have led Congress to expect a great outpouring of goods to move in the stream of commerce as a result of unionizing foremen.

It was not until June, 1942, nearly seven years after Congress passed the National Labor Relations Act, that the Board, for the first time, set up a collective bargaining unit consisting wholly of supervisors. *Matter of Union Collieries Coal Co.*, 41 N. L. R. B. 961 (1942). The Military Affairs Committee of the House of Representatives took up H. R. 2239, the purpose of which was to preclude the Board from unionizing foremen under the Act. While Congress was considering the Bill, the Board reversed itself in the *Maryland Drydock* case [49 N. L. R. B. 733 (1943)], saying that it would not establish collective bargaining units of supervisors except in those few trades where supervisors had organized in the past. After the Board, in the *Packard* case [61 N. L. R. B. 4 (1945)], again reversed itself, holding that it would establish such units, both houses of Congress passed, by large majorities, the Case Bill (H. R. 4908), Section 12 of which made plain that Congress never had intended the Board to unionize foremen.

Thus it is clear that there was not any experience of compulsory collective bargaining by foremen that Congress could have had in mind when it purported to say in the preamble of the Act what experience had proved. Congress itself by passing the Case Bill has stated clearly that it did not intend its assertions in the preamble of the National Labor Relations Act of what experience had proved to mean that compulsory collective bargaining by foremen would promote the flow of commerce. Hence, the basis upon which the Court, in the *Jones & Laughlin* case (301 U. S. 1), upheld the constitutionality of the Act does not sustain the decision of the Board in this case.

3. Experience, the Evidence in This Case and Common Sense Show that Unionizing Foremen and Bargaining Collectively over the Terms and Conditions of their Employment Will Tend to Defeat the Constitutional Purpose of the Act, not to Promote It.

The absence of any assertions of fact by Congress that can be held applicable to foremen leaves no basis on which to rest any conclusion that unionizing foremen will further

a constitutional purpose, unless this Court goes much farther than it ever has gone before and holds that compelling unwilling employers and unwilling employees, with the willing, to bargain collectively to be a constitutional purpose, regardless of the effect upon output and upon commerce. Even if there were facts in the record in this case that showed that unionizing Packard's foremen would increase output in Packard's plants, there would not be ground for upholding the order of the Board in the absence of any declaration by Congress that it intended, when it passed the Act, that the Act was to apply to people concerning unionizing of whom Congress had had no experience in the light of which it could lay down a policy.

But there are no such facts in this case. The facts show the opposite.

It is true that, in deciding the case, the Board referred to a series of strikes by members of the Foreman's Association of America in 1944, an "experience" that came on nearly ten years after Congress passed the Act and after the Board, in the *Union Collieries* case [41 N. L. R. B. 961 (1942)] and the *Godchaux Sugars* case [44 N. L. R. B. 874 (1942)] had held out to unions hope of help from the Government in organizing supervisors. The Board seemed to assume that these strikes were for recognition, although in long hearings before a Panel of the National War Labor Board and in its literature the Foreman's Association of America tried to show that they grew out of "grievances" of foremen. (The Panel found that the "grievances" were trivial, non-existent or without merit).

However, even assuming that the strikes were for recognition, it certainly does not go without saying that the Board's trying to forestall strikes of foremen's unions for recognition by certifying the unions, would have the effect of increasing output. There are two things that such a view does not take into account:

First, if history repeats itself, the Board's granting demands for recognition under the Wagner Act will increase strikes as well for recognition as for other concessions; and,

Second, supervisors, unionized, will be less capable than before of doing their principal duty, to secure output from their men, and output will suffer.

More strikes, not less, will result from unionizing foremen. The theory of the Wagner Act seems to be that if unions can, without striking, secure from the Labor Board certification as exclusive representatives of employees, then unions will not strike for recognition. Experience has shown this theory to be incorrect. In each year since the Wagner Act was passed, there have been more strikes arising out of matters that the Labor Board can handle under its procedures than in any of the five years before Congress provided in the Act peaceful means of settling such disputes. Bureau of Labor Statistics, *Strikes in the United States*, 1880-1936, p. 61; Same, Serial No. R 789, *Strikes in 1937*; Same, Serial No. R 939, *Strikes in 1938*; Same, Serial No. R 1114, *Strikes in 1939*; Same, Serial No. R 1282, *Strikes in 1940*; Same, Bulletin No. 711, *Strikes in 1941 and Strikes Affecting Defense Production*, pp. 7, 18; Same, Monthly Labor Review, Vol. 62, No. 5, p. 720; T. R. Iserman, op. cit., pp. 14-15.

Nor, if one is to measure the effectiveness of unionizing foremen under the Wagner Act as an aid to commerce in terms of strikes, can one overlook the record of strikes over matters other than those that the Board can deal with under the Act. In the ten years before Congress passed the Wagner Act, there were, on the average, 1,040 strikes a year reported to the Bureau of Labor Statistics. In each of the ten years while the Act was in effect, there were, on the average, 3,270 a year. In 1945, there were 4,750.

If the Court sustains the order of the Board in the present case, one can confidently foresee that strikes by foremen, both for recognition and to enforce other demands, will grow more, not less. Output, commerce will suffer.

Mr. Reilly, in dissenting in this case, pointed out that the record shows that granting compulsory collective bargaining rights to unions under the Wagner Act does not stop strikes for recognition, and went on to say, consistently

with past experience, that even if the Board, by certifying unions of foremen stopped strikes by them for recognition, it would lay the ground for strikes to enforce a much greater variety of union demands.

If strikes are to be taken as a standard for measuring the effectiveness of certifying exclusive bargaining agents under the Wagner Act as an aid to commerce, we should not ignore another set of figures of the Bureau of Labor Statistics, which shows that in each year since Congress passed the Act, workers represented by unions, although less than half the total, have caused from 92.8 to 98.2 per cent. of all the strikes.

Unionizing foremen will interfere with their doing their work upon which output depends, and will impair commerce, not increase its flow. Ten thousand citizens of Detroit, left to themselves in Packard's plants, could not, without supervision, make automobiles. In Packard's plants, as in all others, output demands that there be someone in the vicinity of the work to tell each of the workers what pieces to make, how and at what machines and with what tools to make them, and how many of them to make; what colors to paint them, how and in what sequence to put them together; to see that they keep at their work and do it well, that they do not take too much time off the job, do not talk too much, loaf, engage in horseplay or in unsafe practices that may injure themselves or their fellows, that they do not waste materials or misuse equipment. Someone must coordinate their efforts, direct them, control them, correct them when they are wrong, dispose of their complaints and grievances or provide information that enables someone else to dispose of them, and keep order. All these things and many others foremen do, and they all are in the interest of output.

Unionizing foremen under the Wagner Act will interfere with foremen's performing these duties and output will suffer. Anyone with first hand knowledge of labor unions or who fairly has read the writing on how they operate, can see readily that this is true when the foremen

are in a union in which their more numerous subordinates predominate and through which the subordinates can control the foremen. It follows as clearly that the results are the same whether the foremen's union is affiliated with the workers' union or professes to be "independent" of the workers' union.

Mr. Madden, former chairman of the Board, tells how in its early days the Board bided its time, culling cases concerning workers, selecting first the strongest to present to this Court, and then going on from the early victories to extend and enlarge its authority. Silverberg and others, *The Wagner Act: After Ten Years*, Bureau of National Affairs, Inc., Washington, 1945, pp. 39-41. Something of the same process is going on now. The Board has brought on first, as a case of original impression, this case, in which the petitioner claims to be an "independent" union, not formally affiliated with the union that under the Wagner Act is the exclusive bargaining agent of the workers whom the foremen supervise. When the trial of this case took place the philosophy on the subject was only developing. There had not come fully to light the aims of the F. A. A. that conflict with the duties of foremen to promote output, nor had there come out fully its relations with unions of workers. These relations undermine the ability of foremen to do their duties. The Board has not presented here as complete a record as that in *Matter of L. A. Young Spring & Wire Co.*, 65 N. L. R. B. No. 59 (1946), or the record in *Matter of Chrysler Corporation*, 69 N. L. R. B. No. 182 (1946). Nevertheless, there is enough, and more than enough in this record to show that output is bound to suffer when foremen unionize under the Wagner Act, and that this is as true when the foremen's union claims to be "independent" as when it does not.

Four things bring this about:

1. In the first place, one must keep in mind the power over foremen that vests in a union when the Board certifies it as exclusive bargaining agent of the foremen under the

Act. If anyone had by law the exclusive right to act for another in buying groceries, hiring a doctor, obtaining living quarters or contracting for other essentials of life, he as "agent" would have great power over his "principal". A union with the exclusive right under the law to determine a member's earnings, fix his hours of work and carry on all his other dealings with his employer that affect his work and his livelihood has this power. It has a power even greater. For if certified under the Act it has power over everybody in the appropriate unit, whether members or not, to the exclusion of all others *and even of themselves*, they must, under the law, permit the exclusive bargaining agent to deal for them with their employer, whether or not they wish it to do so. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332 (1944); *Matter of Hughes Tool Company*, 56 N. L. R. B. 981 (1944), 147 Fed. (2d) 69 (C. C. A. 5, 1945); *Matter of J. I. Case Co.*, 71 N. L. R. B. No. 182 (1946). The control over their constituents that the Wagner Act gives to unions adds to the control that they exercise under their constitutions, by-laws and oaths, through social pressure, moral pressure, ostracism and abuse and through threats of violence and even violence itself.

This control enables unions to compel their constituents to conform to the union's policies. Some of these policies impair the ability of unionized foremen to perform their duties in directing and controlling their men in the interest of output. That the F. A. A. has such policies, the demands it has made upon Packard and other companies, the speeches of its president and what it has itself published all show.

The F. A. A. believes in striking, and, as the record shows, it is quick to strike and it strikes over small things. The foreman's duty is to prevent strikes and to urge employees, instead of striking, to follow the peaceful procedures their contracts provide. The foreman cannot do this effectively when he is subject to control by a union

that strikes as quickly as the union of the rank and file, and with no more reason.

The F. A. A., like most other unions, insists that companies follow seniority in placing and advancing men, and that its members shuffle along in seniority's aging line, regardless of their merit, ability and productivity. It is the foreman's duty to select men and to advance them, or to recommend them for advancement upon the basis of merit, ability and potentiality for future progress. Their doing this duty is as important to the future of the business as to present output. But they cannot do this duty effectively when their own union insists that the company follow seniority in advancing them and when they absorb from their own union a philosophy that conflicts with their duty.

One union policy calls upon each member to do no more than his fellows do. This tends to reduce the efficiency of the whole group to that of the less productive members of the group. Another favors standardized pay, each man receiving what his fellows receive. This leaves unusual productivity unrewarded and stifles initiative and ambition. Unions frequently oppose new methods and machines that increase productivity; often they restrict output; insist that two or more people do what one could do, or require pay for work that no one does. See: Williamson and Harris, *Trends in Collective Bargaining*, Twentieth Century Fund, Inc., 1945, pp. 104-112; Sumner H. Slichter, *Union Policies and Industrial Management*, The Brookings Institution, 1941, pp. 9-10, 50, 95, 164-197; T. R. Iserman, op. cit., pp. 8-9; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 338, 339 (1944).

Whether their union is affiliated with the union of their men or is "independent" of it, the effect of such policies as these upon the ability of the foreman to do his work is the same.

Obviously, when foremen absorb from their labor union policies and principles that conflict with their duties in the interest of output, and when they are subject to the influence and control under the Wagner Act of a union that has these

policies and principles, the union's alleged "independence" does not prevent the foremen from being half-hearted, or worse, in performing their duties, and output is bound to suffer.

(2) Foremen, unionized, are subject to influence and control not only by their own union when its aims and policies conflict with the foremen's duties, but also by the union of the men they are hired to supervise and whom they are supposed to keep at work and working well.

Unionizing foremen amalgamates them in the labor movement with the men they supervise. This alone makes it hard for them to keep order in their departments and to secure a full day of good work from their men. In its original decision in this case (61 N. L. R. B. 4), the Board conceded that when it unionizes foremen under the Act there results a "common bond of sympathy" between the foremen's union and that of the workers, and that, however strongly the foremen's union professes to be independent of the workers' union, it is not truly independent.

But it is not a mere "bond of sympathy" between the foremen's union and the workers' union that works against foremen doing their work whole-heartedly when wishes of the workers and of their union conflict with the duties of foremen. "Solidarity of labor" is not an empty phrase, but a strong and active force, and foremen are subject to it when they unionize or when the Board subjects them to union control by certifying a union as their exclusive bargaining agent under the Wagner Act. One has only to read extracts from Mr. Keys's speeches that are in the record here and the issues of "The Supervisor," official publication of the F. A. A., to see how completely the F. A. A. identifies itself and its members with workers in the labor movement, and how it invariably supports the workers, right or wrong, in their disputes with employers. Characteristically, after the disastrous wartime coal strikes in which the United Mine Workers repeatedly defied the Government, "The Supervisor" in May, 1944, highly praised the "sterling qualities" of Mr. John L. Lewis, concluding:

> "If any man in the history of unionism ever deserved the title, Labor Leader, in the true meaning of the words, it is John L. Lewis."

(3) But even stronger forces are at work to undermine the faithfulness with which unionized foremen attend to their duties when wishes of their men and of the union of their men conflict with those duties. The whole bargaining strength of the foremen's union depends upon the good will of the workers and of their union. The "right to strike" of foremen and their union is worthless unless the union of the rank and file forbids its members to take the foremen's jobs. In the present case, the F. A. A. admitted this, and it admitted that it was able to call strikes of foremen in the spring of 1944 only because it had an agreement with the workers' union that qualified workers would not be permitted to do the work of striking foremen. It admitted that, during a strike of foremen of Republic Steel Company, workers refused to cross the foremen's picket line, pursuant to agreement between the F. A. A. and the workers' union.

A great deal of even stronger evidence of the rank and file unions' control over the F. A. A. since then has come to light and is not denied. The dissenting opinion of Mr. Reilly in *Matter of Chrysler Corporation*, 69 N. L. R. B. No. 182 (1946), shows that the Company offered in evidence hundreds of exhibits, many of them in the form of letters exchanged by the F. A. A. and workers' unions, showing the close relation between the F. A. A. and unions of workers under foremen that the F. A. A. had organized, and showing that the workers' unions can and do cause the F. A. A. to interfere with its members' performing their duties faithfully when wishes of the workers' unions conflict with those duties. The Trial Examiner of the Board excluded all of this evidence upon the ground that it was irrelevant. The Board sustained the rulings of the Examiner. It seemed to think that no amount of evidence concerning the adverse effect upon output of the foremen's unionizing would deter it from certifying the foremen's union. Even before this, the Board had said in *Matter of*

Jones & Laughlin Steel Corporation, 66 N. L. R. B. No. 51 (1946), that no concern about

"what is best for industry or even for employees"

would stop its unionizing foremen under the Act. Unable, in cases on foremen, to meet the test of constitutionality on the basis of which this Court upheld the Act as it applies to workers, the Board now says that it will unionize foremen regardless of the effect of its doing so upon output and notwithstanding its effect upon commerce.

Evidence to which Mr. Reilly referred in his dissent in the *Chrysler* case showed that unionizing foremen in the supposedly independent F. A. A. enables unions of workers, through the F. A. A. to influence and control foremen for the benefit of members of the rank and file unions and in derogation of the foremen's duties and of the purpose of the Act to increase output. One exchange of letters between the F. A. A. and a C. I. O. union showed that the F. A. A. had to call off its strike at B. F. Goodrich Rubber Company when the rank and file, represented by the C. I. O. union, tired of the strike and threatened to go through the F. A. A.'s picket lines and to take the foremen's jobs. About the same thing happened during a strike of members of the F. A. A. at Murray Corporation of America. The Board's records show, and the President of the F. A. A. testified that time and again the F. A. A. has had to withdraw petitions for certification as exclusive bargaining agent for foremen in steel mills whom the C. I. O. steel workers' union wished to organize. If the rank and file can tell members of the F. A. A. when they may strike and when they may not, and if it can tell the F. A. A. what plants it may organize and what ones it may not, then it surely can tell foremen also what duties to perform and what ones to shirk.

Evidence to which Mr. Reilly refers in the *Chrysler* case, but which the Board excluded, shows that rank and file unions are doing this, even now, and that the F. A. A. is assuring rank and file unions that, once unionized, foremen will grant rank and file grievances more freely and enforce shop rules less strictly.

Further evidence of this is in the official publication of the F. A. A. There one finds, for example, that the F. A. A. threatened to strike at Ford's, where it is the exclusive bargaining agent for foremen, because the Company asked the foremen to perform duties distasteful to the rank and file, such as disciplining rank and file workers for loafing in wash rooms, for leaving their work early and for ringing each other's time cards. "The Supervisor", Vol. 4, No. 19, p. 8, August, 1946.

On January 6, 1946, the F. A. A. adopted a "policy" fully committing itself to support strikes of rank and file workers, and to refuse to permit its members to enter struck plants in the absence of the striking union's agreeing to their entering the plants. "The Supervisor", Vol. 4, No. 12, pp. 1, 7-8, January, 1946. This "policy" directs representatives of the F. A. A., when rank and file workers strike, to confer with representatives of the rank and file and provides that foremen shall enter the plant and work only upon terms and conditions that are mutually agreeable to the F. A. A. and to the striking union. The "policy", in conclusion, says:

> "Membership in the Foreman's Association provides a duty and obligation on each member to conduct himself at all times in accordance with the principles and policies of the Association."

Thus, the policies and principles of the Association, and its agreements with rank and file unions, supersede the foremen's duties.

The evidence cited by Mr. Reilly in the *Chrysler* case shows that, besides being dependent upon the rank and file for success in its collective bargaining efforts, the F. A. A. is greatly obliged to unions of rank and file employees for their help in organizing foremen. It shows, also, how and why the F. A. A. attempts to conceal its relations with rank and file unions. Mr. Reilly says:

> "A fairly typical situation is set out in a request of April 25, 1944, from the financial secretary of Local 887, UAW-CIO. His letter states in part:

'We are also attempting to organize North American Aviation 100% in all departments and inasmuch as it is impossible for foremen to hold membership in our local union, we would like them to organize.'

'If it is possible to secure 500 copies of the April issue of your publication, free of charge, we would be glad to make distribution of same to all foremen at North American Aviation.''

"In reply, the president of the Foreman's Association states:

'Your offer to distribute our publication to foremen is gratefully received and fully appreciated, but we are faced with the constant allegation on the part of employers at our hearings before the various Governmental Boards that we are an affiliate of the UAW-CIO. We, of course, deny such allegation and the officers of the locals and the international UAW-CIO deny them also.

'Therefore, if ways and means can be found to see that the foreman receive this material other than being distributed by members of the UAW-CIO themselves, it would probably eliminate further argument and further allegations on the part of the employer.'

"In the letter quoted in part in the preceding paragraph, the Foreman's Association president suggested that the UAW local furnish a list of supervisors to whom Foreman's Association literature could be sent direct. On May 13, 1944, the local replied that it would be impossible to secure such a list but stated:

'However, we have close to 200 stewards in the plant, for both day and night shifts, therefore, if you would send us about that many papers, we are certain of a good distribution of them right on the foremen's desks. We shall also be glad to handle any other material you may care to send us.

'P. S. Material can be left on the foremen's desks without anyone knowing who left it there.'"

Mr. Reilly continued:

> "These are not the only exhibits indicating the close relationship between the Foreman's Association and the CIO. In a letter of December 8, 1944, from the Foreman's Association president to Walter Reuther, the vice president of the UAW, there is the following:
>
> > 'Mr. Gosser [UAW-CIO regional director at Toledo] and I discussed our problem of organizing the foremen in that area who are carrying associate member cards in the UAW-CIO, and he is very familiar with the problems of foremen, and impressed me immensely with his views on this subject. I am looking forward to other pleasant discussions with Mr. Gosser, and feel sure that our problem will be settled to our satisfaction through his understanding.'"

The Company had offered in evidence correspondence of this kind between the F. A. A. and 22 locals of a single union, the UAW-CIO, which represents the rank and file in Packard's plants.

Almost invariably, in accepting the help of rank and file unions, the F. A. A. assured the unions of the F. A. A.'s good will and cooperation, urged them to let the F. A. A. know when it could "return the favor" or spoke of "benefits" *to the rank and file* that would result from unionizing foremen—benefits at the cost of the companies, whose interests it is the duty of foremen to protect.

Mr. Walter P. Reuther, now president of the U.A.W.-C.I.O., in Case No. 111-4665-D before the National War Labor Board on August 22, 1944, declared:

> "We haven't had any strikes in General Motors among the foremen, and that's primarily because we have been too busy with some of our own problems, and we have never encouraged the foremen to organize in General Motors. I say that if our union wanted the foremen in General Motors organized, they would have been organized the same as Chrysler and Ford and the other ones."

All this evidence shows relations between the F. A. A. and unions of their men that, unless all human experience is ignored, must persuade the Court that, while professing to be "independent," the F. A. A. is, in fact, under great obligation to unions of the rank and file, and particularly to the U.A.W.-C.I.O., and that it is dependent upon those unions.

(4) The fourth factor that makes it hard for unionized foremen to perform their duties faithfully arises from the habit that most unions have, and that the F. A. A. has, of abusing and vilifying the companies for whom the foremen work and whose interests are in the foremen's hands. Since its beginning, over the radio and in its magazine, the F. A. A. has sought to teach foremen to hate their jobs and their companies, endlessly repeating slanders, notwithstanding that the Panel of the National War Labor Board found them false. Foremen who are subject to the influence of a bargaining agent that indulges in this sort of propaganda, who pay dues to it and who, under the law, must let it handle all their dealings with the company and obey its orders, cannot be expected to use proper diligence in carrying out their duties to the company.

We submit that the strikes that seem to go hand in hand with collective bargaining under the Wagner Act, the policies that foremen absorb from their union, the state of mind that results from the union's slanders, the influence of their men and of the union of their men to which foremen subject themselves when they organize, all tend to defeat the constitutional aim of the Wagner Act, and call upon this Court, in the interest of output, upon which depend our strength in war, and our standard of living always, to set aside the order of the Board in this case.

SECOND POINT.

By the Administrative Procedure Act, Congress has called upon this Court to correct a legal wrong that the Board committed in subjecting the agents through whom Packard deals with its employees to influences that conflict with their duties as such agents.

No rule of law is stronger, better settled or of greater credit to Anglo-American jurisprudence than that which forbids an agent, in his own interest against his principal, to incur obligations that may tempt him into disloyalty or to enter into relations that create a risk, a danger or a possibility of his being influenced to do less than his best for his principal. *Pepper* v. *Litton*, 308 U. S. 295 (1939); *United States* v. *Carter*, 217 U. S. 286 (1910); *Robertson* v. *Chapman*, 152 U. S. 673 (1894); *Michoud et al.* v. *Girod et al.*, 45 U. S. 503, 555 (1846); *Wadsworth* v. *Adams*, 138 U. S. 380 (1891); *Pratt* v. *Shell Petroleum Co.*, 100 Fed. (2d) 833 (C. C. A. 10, 1938), cert. den. in 306 U. S. 659 (1939); *Trice* v. *Comstock*, 121 Fed. 620 (C. C. A. 8, 1903); *Meinhard* v. *Salmon*, 249 N. Y. 458 (1928); *Stephens* v. *Gall*, 179 Fed. 938 (1910).

The rule operates in advance to prevent disloyalty. It does not make the principal wait until injury has resulted from an agent's having assumed an improper position. It forbids the agent's getting into such a position.

Unionizing foremen is dead against the rule. It divides the foreman's loyalty twice: once between his company and his own union, which has aims and policies that conflict with his duties to the company, and again between his company and the union of the rank and file, which through his union can influence him to neglect his duties. The Act, itself, by words precisely appropriate for the purpose, seems intended to preserve the rule. In Section 2(2), it says that the term "employer" includes "any person acting

in the interest of an employer," as foremen surely do in directing and controlling the men under them.

The Board has admitted that unionizing foremen, even when their union claims to be independent, divides the loyalty of foremen in a way that contravenes the rule on fidelity, but the facts show even greater dividing of loyalty than the Board admits.

In its first decision in this case, the Board conceded that "in an absolute sense," the F. A. A.

> "is not independent of the C. I. O."

In the Board's next decision in the *Packard* case, the Chairman of the Board stated that unionizing foremen into the F. A. A. gives rise to

> "possible dual allegiance"

and that problems of divided loyalty will "inevitably" arise. He said that unionizing foremen into the F. A. A. will result in

> "occasional conflict of interest."

He spoke of the "validity" of the Company's fear that unionizing the foremen into the F. A. A. would divide their loyalty.

These are the very things that the rule on fidelity guards against, and that rule precludes subjecting Packard's foremen to the control that the F. A. A. would have over them as their exclusive bargaining agent.

Even before Congress passed the Administrative Procedure Act, this Court and others held that the Board could not effectuate what it considers the policies of the National Labor Relations Act so single-mindedly as to defeat other objects of law and of national policy, as by condoning mutiny [*Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31 (1942)], by encouraging idleness or by discouraging output and employment [*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177 (1941)], or by infringing the right of free speech [*National Labor Relations Board* v. *Virginia Electric & Power*

Co., 314 U. S. 469 (1941); *National Labor Relations Board v. American Tube Bending Co.*, 134 Fed. (2d) 993 (C. C. A. 2, 1943), cert. den. in 320 U. S. 768 (1943)].

It is clearly wrong for the Board, in derogation of the rule on fidelity, to force loyal foremen into disloyalty by subjecting them to control by a union whose aims and policies conflict with duties that foremen undertake to perform, and whose relations with the union of the men whom the foremen supervise jeopardize the fidelity with which foremen do their duties. It is clearly wrong for the Board to compel employers to keep as their agents foremen who subject themselves to influences that undermine their loyalty.

It is just such wrongs as this, we believe, that Congress intended the Courts to correct when it provided for judicial review of actions of administrative agencies at the request of anyone suffering "legal wrong" as a result of such action. Public Law No. 404, 79th Congress, c. 324, § 10. Surely an action that does violence to the fundamental rule of law against divided loyalty comes squarely within the meaning of this statute and is an abuse of discretion that, under the Administrative Procedure Act [§ 10], the Court ought to correct.

Senator McCarran, in discussing the Administrative Procedure Act, points out that Congress intended by it to authorize the Courts to pass upon every type of question of law, and, upon such questions, not to defer to assumed "expertness" of members of administrative agencies. Hon. Pat McCarran, "*Improving Administrative Justice*", 32 American Bar Association Journal, 827, 831. We have here a question of law, and surely this Court is far more competent to pass upon it than members of the Board, even were they assumed to be "expert" in the limited field of labor relations.

In his discussion of the Administrative Procedure Act, Senator McCarran takes pains to emphasize that one of the things Congress hoped to accomplish was to

> "cut down the 'cult of discretion' so far as federal law is concerned,"

to make judicial review not merely "available" but "plenary in every proper sense of the word" and to make law superior to "expertness" when the two conflict. Senator McCarran continues:

> "* * * Heretofore, with some notable exceptions, the trend of Government has been for legislatures to shed their responsibilities for the making of law. There has been a much too ready acceptance of the idea that the real work of governance must be left to the 'experts.' The Courts, too, seem to have become imbued with the idea that the judicial duty and function is theirs to surrender. In fact, however, it may be doubted that either the Congress, the Courts, the experts or the public gain by such unrestrained methods. Such a trend will ultimately leave Congress and the Courts with little vital work to perform. * * *
>
> "* * * By abdication, legislatures and Courts avoid many problems, rather than solve them. If we would proceed on the premise that we are stating law, we would in part at least narrow the area of doubt and 'discretion.'"

It seems to us that the present case is one that clearly calls upon the Court to exercise its judicial powers to correct a decision that is a great wrong and a legal wrong.

Even did the question not concern the general law of agency, the Board's decisions on foremen, in which members of the Board have divided, in which it has reversed itself again and again upon the propriety of unionizing foremen at all and upon the ranks that it will include in a single unit when it unionizes some, and in which it has gone from one ground to another to support what it does, do not reflect expertness that makes their decisions necessarily or even presumably correct. On the contrary, the decisions reflect uncertainty and confusion. We respectfully submit that the Court ought to end the uncertainty and confusion, and to forestall still greater perplexities and dilemmas that would result from following the Board's views, by holding that foremen are not "employees" under the Act, and by holding also that a unit of foremen does not "effectuate the policies of the Act." Although recently the Board has tried to claim that it is without power to dismiss petitions because alleged units are not appropriate, Section 9(c) of

the Act is permissive, and the Board many times has dismissed petitions because the units alleged were not appropriate to effectuate the policies of the Act. See: *Matter of Boeing Aircraft Company*, 45 N. L. R. B. 630 (1942); *Matter of Stanley Company of America, et al.*, 45 N. L. R. B. 625 (1942); *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733 (1943).

The Board, admitting danger of disloyalty when it unionizes foremen, says that the Company, through its "normal disciplinary procedures" can punish foremen whose union leads them into disloyalty. This stands the rule of fidelity on its head. The rule operates in advance to prevent disloyalty by forbidding relations that may lead an agent into disloyalty. Furthermore, the Board does not say how the company is to discover and correct disloyalty in lower ranks of supervision when their superiors are in the same union and bound by the same principles, policies and obligations, and when the only supervisors not included in the bargaining unit may be far, and in some of the Board's cases miles, from where acts of disloyalty occur.

The Board argues further that foremen's unionizing to bargain collectively concerning their own terms and conditions of employment need not "necessarily" affect their faithfulness to the Company. It is not merely when obligations of agents and relations between them and those toward whom they act for their principal will "necessarily" result in breach of trust that the obligations and relations are unlawful. It is when such obligations and relations create the "risk" or "danger" of disloyalty that the rule operates. *Michoud et al.* v. *Girod et al.*, supra. The Board's argument overlooks the fact, explicit and implicit in every record before it, that the policies and principles of the F. A. A. itself, make it an improper organization to exercise over foremen the power of an exclusive bargaining representative. It overlooks the further fact that there must and do exist between the F. A. A. and unions of the rank and file relations that heighten and emphasize the impropriety of its acting as such a bargaining agent. The Board's argument certainly has no validity as applied to its putting three ranks of supervisors into one unit and certifying one union as their exclusive bargaining representative.

THIRD POINT

Particularly detrimental to output, and particularly obnoxious to the rule against divided loyalty, is that part of the decision in this case that includes general foremen and foremen in the same bargaining unit with their subordinates, and subjects them to control by a union in which the subordinates predominate.

General foremen direct and control the foremen under them; foremen, the assistant foremen under them. How subjecting all three ranks to control by one union, in which those of lower rank predominate, will reduce the ability of these in the higher ranks to perform duties that conflict with wishes of their subordinates, or with "policies" of the union that the subordinates determine, is obvious. That such an arrangement is inconsistent with the rule on fidelity and is a "legal wrong", is equally obvious.

In most of its cases on rank and file employees, the Board has held it wrong to include supervisors in the same bargaining units with workers, and, before it decided the *Packard* case, the Board had held, unanimously, that it was wrong to include higher ranking supervisors in one unit with their subordinate supervisors, and to certify one union as the exclusive bargaining agent of both groups. See: *Matter of Stanley Company of America et al.*, 45 N. L. R. B. 625 (1942); *Matter of Boeing Aircraft Company*, 45 N. L. R. B. 630 (1942); *Matter of General Motors Corporation*, 51 N. L. R. B. 457 (1943). The Board saw what is obvious, that if the more numerous subordinates were in one unit and in one union with their superiors, there would be danger, on the one hand, that the subordinates could, through the union, interfere with the proper performance by the superiors of their duties, and danger, on the other hand, that the superiors would use their authority over those under them to influence the latter in organizing and bargaining.

But in the *Packard* case, the Board went against all it had said and done before. It put foremen in one unit with assistant foremen, and general foremen in the same unit with their lower-ranking subordinates, and certified one union as the exclusive bargaining agent for all of them.

In some of its later cases, the Board, upon substantially the same facts as appear in the *Packard* case, at least gave the highest ranking supervisors a chance to escape control by their subordinates, directing for the highest ranking men separate elections in which they voted against the F. A. A. representing them. See: *Matter of Kelsey-Hayes Wheel Co.*, 66 N. L. R. B. No. 76 (1946); *Matter of Midland Steel Products Co.*, 65 N. L. R. B. No. 177 (1946); *Matter of Hudson Motor Car Company*, 67 N. L. R. B. No. 52 (1946).

The *Packard* decision obviously is incorrect in this respect, if in no other.

CONCLUSION

The order of the Board ought to be set aside, or at the very least, modified to exclude from the bargaining unit foremen and general foremen.

Respectfully submitted,

NICHOLAS KELLEY,
T. R. ISERMAN,
Attorneys for Chrysler Corporation, amicus curiae,
70 Broadway,
New York 4, N. Y.

RATHBONE, PERRY, KELLEY & DRYE,
of Counsel.

January 4, 1947